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# Reproductive Health: Morals, Margins and Rights

Rosamund Scott\*

**Abstract** – Reproductive interventions and technologies have the capacity to generate profound societal unease and to provoke hostile reactions underpinned by various moral concerns. This paper shows that this position currently goes relatively unchecked by the European Court of Human Rights, which allows the margin of appreciation and consensus doctrines significantly to limit the scope of reproductive rights under the right to respect for private and family life under Article 8. This occurs both in relation to the interest in avoiding reproduction at stake in abortion, and that in achieving it at stake in medically assisted reproduction. The paper demonstrates significant flaws in the Court's framing and deployment of these doctrines in its reproductive jurisprudence. It argues that, as regards existing and upcoming reproductive interventions and technologies, the Court should attend to the concept of reproductive health, long recognised in international conventions and policy materials.

**Keywords** – abortion, Article 8 ECHR, margin of appreciation and consensus doctrines, medically assisted reproduction, new reproductive technologies, reproductive health

## INTRODUCTION

The right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR) has come to play an increasingly prominent role in the European Court of Human Rights' (ECtHR) reproductive jurisprudence, long overtaking the right to marry and found a family under Article 12.<sup>1</sup> As a right that can be limited, for instance for the 'protection of health or morals, or... the rights and freedoms of others', the critical question is typically whether State intervention in, or a failure to respect, the right is justified. In the reproductive context, the answer has been significantly affected by the discretion given to States, for example in relation to 'sensitive moral and ethical issues',<sup>2</sup> by means of the margin of appreciation doctrine<sup>3</sup> – frequently,

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<sup>1</sup> The relevant parts of Article 8 are set out in the text below. Article 12 states: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' In *S.H. v Austria* [2012] 2 FCR 291 (hereafter *S.H.*), the Joint Dissenting Opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria noted, para 3: 'Article 8 of the Convention... appears to play an enhanced role now regarding questions related to procreation and reproduction.'

<sup>2</sup> *Evans v United Kingdom* (hereafter *Evans*) (2008) 46 EHRR 34, para 59, discussed below.

<sup>3</sup> By which the Court gives a degree of supervised discretion to Contracting States' legislative, judicial or administrative actions in relation to various rights including under Article 8. D. Harris and others, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (OUP, 3<sup>rd</sup> edn, 2014) 14.

though not invariably, criticised for its relativist tendencies.<sup>4</sup> Although the Court holds that the margin is narrowed where particularly important interests are at stake, and has accepted that the reproductive context invokes such interests, it also maintains that it is broadened if there is no consensus among Contracting States either as to the importance of the interest or the best way of protecting it.<sup>5</sup> This article critiques the Court's use of the margin and consensus doctrines in the two central reproductive spheres: the interest in avoiding reproduction at stake in abortion, and the interest in achieving it at stake in medically assisted reproduction, with particular reference to reproductive donation. It shows that the Court's leading reproductive cases have been flawed both by excessive deference to local 'morals' and by questionable deployment of the consensus doctrine, with highly detrimental impacts on women's, and sometimes men's, reproductive interests. It argues that, as regards both existing and upcoming reproductive interventions and technologies, the Court should develop its jurisprudence with reference to the concept of reproductive health, long recognised in various international conventions and policy materials.

The paper first introduces the margin and consensus doctrines, notes their main academic criticisms, and foreshadows key problems inherent in their application in the reproductive sphere – including the Court's use of the consensus doctrine to broaden the margin – that are discussed in the following sections.

The next section argues that, by giving excessive deference to concerns as to 'morals' (put forward by the Irish government) in relation to the application of the right to life under Article 2 to the fetus, the Court's abortion jurisprudence<sup>6</sup> has not recognised the implications for the reduction in the margin of appreciation of an existing consensus under Article 8 that abortion should be available on maternal health and wellbeing grounds: thus, *if* Article 2 applies to the fetus, it has *at best* a right that can be limited on the basis of such grounds. It then turns to the Court's jurisprudence on reproductive donation, arguing that here too the Court has not given due weight to the extent of a permissive consensus among Contracting States and has neglected the

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<sup>4</sup> See eg P. Paczolay, 'Consensus and Discretion: Evolution or Erosion of Human Rights Protection?', s 3, in *Dialogue between Judges* (ECtHR, Council of Europe, 2008); the joint dissent in *S.H.*, para 11, referring to a 'minimalist' approach; Y. Arai-Takahashi, 'The Margin of Appreciation Doctrine: a Theoretical Analysis of Strasbourg's Variable Geometry', in A. Føllesdal, B. Peters and G. Ulfstein, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 62-105, 81, reviewing the main strands of criticism, but writing in defence of the doctrine.

<sup>5</sup> See eg *Evans*, para 77, for the Court's statement on the relationship between the importance of the interest and the margin and consensus doctrines. In *Parrillo v Italy* (2016) 62 EHRR 8 (hereafter *Parrillo*) the Court noted the importance of reproductive interests in various cases including *Evans* and observed, in para 174, that 'prospective parenthood', is a 'core right' under Article 8; see further text preceding n 70 below.

<sup>6</sup> *A, B & C v Ireland* (2011) 53 EHRR 13 (hereafter *A, B & C*). The relevant part of Article 2 states: 'Everyone's right to life shall be protected by law.'

concomitant reduction in the margin, endorsing the weak and ill-considered concerns as to ‘morals’ (of the Austrian government).<sup>7</sup>

Thereafter the paper argues that the errors identified in the preceding section have been accompanied by the Court’s failure to appreciate that the objectives of avoiding reproduction or of achieving medically assisted reproduction have been accepted in international conventions and policy materials as central dimensions of reproductive health, which entails interests that give rise to certain needs, and autonomy interests. While health interests giving rise to needs are recognised and protected to some degree in the abortion context, autonomy interests are not; conversely, while autonomy interests are at least recognised in relation to reproductive donation, treatment needs are not. If the Court is to move forward in this area, it should develop a greater understanding of reproductive interests as these relate to reproductive health, as the Council of Europe already has.<sup>8</sup> In turn, this would lead to more rigorous scrutiny of the alleged necessity of State intervention in applicants’ Article 8 rights, or of failures to protect these, with closer attention to the distinction between the importance of the interest and the best means of protecting it, and less scope for the Court to defer to the margin doctrine.

As the final section highlights, with new reproductive technologies such as mitochondrial replacement techniques (MRTs) on the point of entering clinical practice (for example in the United Kingdom (UK)) and scientific progress in relation to in-vitro-derived gametes, the Court will be increasingly challenged to develop its reproductive jurisprudence in more robust ways. If it continues to allow the consensus doctrine to broaden the margin of appreciation, it potentially allows relatively weak concerns as to ‘morals’ held by those who have no need for a given reproductive intervention – and thus no interest in choosing it – to bar serious consideration of its permissibility by the Court. In effect, this is to say that where the seriousness of the interest in using a new reproductive technology is contested, those with moral objections can preclude the Court from sufficiently stringent analysis of States’ obligations under Article 8. This is a major flaw in the Court’s framing of the margin and consensus doctrines.

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<sup>7</sup> *S.H.*

<sup>8</sup> Council of Europe, *Access to Safe and Legal Abortion in Europe*, Resolution 1607 (2008). Paras 5 and 7.5 specifically refer to ‘reproductive health’; the concept can be said to underlie much of the resolution; Council of Europe, Report by N. Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his Visit to Ireland from 22 to 25 November 2016, Strasbourg 29 March 2017, Comm DH(2017) 8.

## THE MARGIN OF APPRECIATION AND CONSENSUS DOCTRINES

The Court's well-known approach to analysis of a State's negative and/or positive obligations forms the backdrop to the margin of appreciation and consensus doctrines. It should be briefly set out here with particular reference to Article 8, which states in relevant part:

(1) Everyone has the right to respect for his private and family life... (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society... for the prevention of... crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Early on, the Court established that the object of Article 8 was the protection of individuals from arbitrary State interference.<sup>9</sup> The article's limitation clause is very similar to those limiting the other 'personal sphere' rights under Articles 9-11.<sup>10</sup> Regarding the notion of 'necessary in a democratic society', in the freedom of expression case of *Handyside v United Kingdom* (hereafter *Handyside*), in which the Court had to consider the justifiability of an interference under Article 10(2), the Court observed that this should not be understood as 'indispensable', nor just 'useful', 'desirable' or 'reasonable', and referred to the 'pressing social need implied by the notion of "necessity"'.<sup>11</sup> It also held that a restriction on a right must be 'proportionate to the legitimate aim pursued' and that a State's given reasons to justify interference must be 'relevant and sufficient'.<sup>12</sup> Proportionality between the interests and rights of the individual and those of the community, including the public interest, thus underlies the assessment of necessity and the Convention as a whole,<sup>13</sup> and is relevant also to the Court's analysis of positive obligations. Regarding the distinction between these and negative obligations, the Court has acknowledged that the boundary is not precise,<sup>14</sup> and that the notion of 'respect' is particularly unclear for positive obligations.<sup>15</sup> In the reproductive context, the Court has also observed that 'certain factors' are relevant to a State's

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<sup>9</sup> *Belgian Linguistics case* (1968) 1 EHRR 241. See further Harris and others, n 3 above, 524-525.

<sup>10</sup> Respectively, the rights to 'freedom of thought, conscience and religion', to 'freedom of expression' and to 'freedom of peaceful assembly and... of association with others'. For a general review of the relevant limitation clauses, see Harris above n 3, 505-520.

<sup>11</sup> (1979-80) 1 EHRR 737 para 48.

<sup>12</sup> Ibid paras 49 and 50 respectively.

<sup>13</sup> In *Soering v United Kingdom* (1989) 11 EHRR 439, para 89, the ECtHR observed: 'Inherent in the whole... Convention is a search for the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's human rights.'

<sup>14</sup> See eg *Tysiāc v Poland* (hereafter *Tysiāc*) (2007) 45 EHRR 42, para 111.

<sup>15</sup> '[H]aving regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case'. Ibid para 112. In *X and Y v Netherlands* (1986) 8 EHRR 235 (hereafter *X and Y*), para 23, the Court noted that these 'may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'. On the lack of structure in the Court's analysis of these, see L. Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations' in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2013) 162-182.

positive obligations, such as the importance of the interest, and whether “‘fundamental values” or “essential aspects” of private life are in issue’.<sup>16</sup> Furthermore, its finding that rights should be ‘practical and effective’, rather than ‘theoretical or illusory’, is often cited, for example in the abortion context.<sup>17</sup>

Both in relation to negative and positive obligations, the State has a certain *margin of appreciation*. In theory, this is a power given to States under the assumption that it will be exercised with attention both to the content of Convention rights and to the need to justify any interference, so the key question will be whether a State has exceeded its power, or its margin, in the proportionality assessment.<sup>18</sup> The margin doctrine positions the ECtHR, as an international court, as subsidiary to the legal systems of Contracting States, although what this should mean is itself debateable. On one view, consistent with Articles 1, 13 and 34 of the Convention, this is in the *procedural* sense that States are obliged to secure to their citizens the rights and freedoms of the Convention and should have the chance to redress violations before a case is brought to the Court.<sup>19</sup> Yet, as Letsas has discussed, in *Handyside* – which concerned whether a conviction for possessing an obscene article was justifiable under Article 10(2) for the ‘protection of morals’ – the Court went further and suggested that the Court is subsidiary in that State authorities have *normative* priority over it.<sup>20</sup> Having stated that ‘it is not possible to find in the domestic law of the various Contracting States a *uniform European conception of morals*’, since ‘[t]he view taken by their respective laws of the requirements of morals varies from time to time and from place to place’,<sup>21</sup> the Court continued:

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a *better position* than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them... [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.<sup>22</sup>

Although it later stressed that the margin is not ‘unlimited’, that it can give the ‘final ruling’ and that its supervision relates both to the aim and the necessity of the challenged measure,<sup>23</sup> many of

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<sup>16</sup> See eg *A, B & C*, para 248. For factors concerning the state, see further para 248.

<sup>17</sup> *Airey v Ireland* (1981) 3 EHRR 592, para 24. See eg *Tysiac*, para 113.

<sup>18</sup> Harris and others, n 3 above, 511.

<sup>19</sup> G. Letsas, ‘Two Concepts of the Margin of Appreciation’, (2006) 26:4 OJLS 705-732, 722 and citations therein. This is the ‘structural’ sense of the margin discussed by Letsas, 706. See also Harris and others, n 3 above, 511.

<sup>20</sup> Letsas, *ibid*.

<sup>21</sup> *Handyside*, para 48, emphasis added.

<sup>22</sup> *Ibid*, emphasis added.

<sup>23</sup> *Ibid*, para 49.

its cases belie this claim,<sup>24</sup> including in the reproductive cases discussed below, which frequently rely on the above passage.

The margin doctrine is highly controversial and, as Arai-Takahashi notes, has received ‘more criticism than praise’:<sup>25</sup> its operation is described as inconsistent, opaque, vague and indeterminate with a risk of the Court losing its supervisory role, with relativist or subjective results.<sup>26</sup> Judges, including from the Court, have expressed concern about the doctrine, both judicially and extra-judicially.<sup>27</sup> Benvenisti has described it as ‘a principled recognition of moral relativism... at odds with the concept of the universality of human rights’, and particularly inappropriate in conflicts between majorities and minorities.<sup>28</sup> In the reproductive sphere the margin doctrine is frequently deployed in relation to the aim of ‘morals’ under Article 8(2) yet, as Letsas notes, the Court never seems to have considered the meaning of ‘morals’,<sup>29</sup> and in various cases has taken this to be the moral preferences of the majority, which are thereby protected as a legitimate aim.<sup>30</sup> At the same time, the idea that questions of morals are contingent and hence variable between States is inherently problematic if Convention rights are both moral and legal, as various scholars have argued.<sup>31</sup>

As well as framing the margin doctrine in a normative light, *Handyside* was the origin of the idea that a lack of a common approach, or a *consensus*, in relation to a legal issue among Contracting States supports their margin of appreciation.<sup>32</sup> As noted above, the Court asserted that ‘it is not possible to find in the domestic law of the various Contracting States a uniform European

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<sup>24</sup> Letsas, n 19 above, esp 724-729; and see below in text, and accompanying notes 41-47.

<sup>25</sup> Arai-Takahashi, n 4 above, 63-64.

<sup>26</sup> Ibid 79-81 and literature cited therein.

<sup>27</sup> Eg Judge de Meyer, Partly Dissenting Opinion, in *Z v Finland* (1998) 25 EHRR 371, s III, in which he observed of the margin doctrine that the Court ‘has already delayed too long in abandoning this hackneyed phrase and recanting the relativism it implies... [W]here human rights are concerned, there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not.’ Paczolay, n 4 above.

<sup>28</sup> E. Benvenisti, ‘Margin of Appreciation, Consensus and Universal Standards’, (1998-99) 31 N Y Univ J Int Law Polit 843-54, 844, 847.

<sup>29</sup> G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007) 122. Letsas uses the term ‘public morals’.

<sup>30</sup> Letsas, n 19 above, 729.

<sup>31</sup> See eg G. Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’, (2010) 21:3 EJIL 509-541, arguing that Strasbourg’s ‘interpretive ethic’ justifiably prioritises a moral reading of the Convention (538) and that, while the margin doctrine has hampered this in relation to Articles 8-11 to some degree, the Court’s use of the doctrine is waning following judicial and academic criticism (531-532). Letsas argues that ‘The moral principles underlying human rights determine what the states’ margin of appreciation is, not the other way around.’ Letsas, n 29 above, xv. On the moral foundations of human rights, see more generally J. Tasioulas, ‘On the Foundations of Human Rights’, in R. Cruft, S.M. Liao and M. Renzo, *Philosophical Foundations of Human Rights* (OUP, 2015) 45-70.

<sup>32</sup> As noted by Letsas, n 19 above, 724.

conception of morals'; in turn, this was said to generate a margin of appreciation in relation to Article 10(2).<sup>33</sup>

Whether consensus should be relevant to human rights is contested.<sup>34</sup> It is sometimes said that the Court risks losing States' confidence if it does not attend to the existence or lack of common ground between States;<sup>35</sup> however, this seems doubtful for a range of theoretical and practical reasons.<sup>36</sup> While a positive feature of the Convention frequently stressed by the Court is that it is a 'living instrument' that evolves in relation to changing social conditions,<sup>37</sup> which itself explains the increasing scope of Article 8, at the same time the consensus doctrine, with the weight it attaches to possible variations in moral perspectives between States and, within this, often particularly to majority views, has the capacity to act as a significant and, as shown below, problematic constraining power in the development of the Court's jurisprudence.<sup>38</sup> Furthermore, as Letsas has argued, arguments invoked in relation to the aim of protecting morals will likely include 'hostile external preferences'.<sup>39</sup> These are very evident in the jurisprudence discussed below, in which the need for medical assistance in reproduction concerns the interests of a minority of couples or individuals.<sup>40</sup>

To see the forthcoming analysis of the application of the margin and consensus doctrines in the reproductive jurisprudence under Article 8 in the context of the Court's broader case law, the Court has also made considerable use of these doctrines not only in Article 8 cases concerning different subject matter, but also in cases concerning analysis of State interferences in the other

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<sup>33</sup> *Handyside*, para 48.

<sup>34</sup> Harris and others, n 3 above, 10-11, argue that the acceptability of the margin and consensus doctrines may turn on the degree to which State practice accords with human rights standards. However, ultimately this could imply that they are acceptable where, in effect, they are irrelevant. Letsas, n 29 above, 124, argues that the States Parties undertook 'to respect human rights... [not] what, at each given time, most of them take those rights to be'.

<sup>35</sup> Harris and others, n 3 above, 11 and citations therein.

<sup>36</sup> Benvenisti, n 28 above, 852-3, argues that the doctrine is flawed theoretically (since it relies on 'nineteenth century theories of State consent', such that duties can only be imposed on States in the light of 'emerging custom, or "consensus"') and practically (since it is hard to imagine credible threats to the Court's authority, although the worry of such threats might result in abuse). See also Letsas, n 29 above, 123-5.

<sup>37</sup> *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, para 31.

<sup>38</sup> Benvenisti, n 28 above, 853 refers to the 'perpetuation of ossified and untenable positions'. For a more positive view of the margin and consensus doctrines, see P. Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin', (1990) 11:1-2 HRLJ 57-88, arguing that judicial activism and self-restraint are both 'essential and complementary', 88.

<sup>39</sup> Letsas, n 19 above, 729, and 724-729.

<sup>40</sup> Eg '[f]ertility problems are estimated to affect one in seven heterosexual couples in the UK.' Human Fertilisation and Embryology Authority (HFEA), 'Fertility Treatment 2014 – Trends and Figures', 6, available at [http://hfearchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/docs/HFEA\\_Fertility\\_treatment\\_Trends\\_and\\_figures\\_2014.pdf](http://hfearchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/docs/HFEA_Fertility_treatment_Trends_and_figures_2014.pdf). Treatment with donated eggs or sperm constitutes a minority, rising with age for the former. *Ibid*, Fig 5. Regarding donated sperm, see Tables 4 and 5. All URLs were last accessed 10 October 2017.



‘personal sphere rights’ under Articles 9-11,<sup>41</sup> all of which necessarily include a proportionality assessment under the respective limitation clauses. So, for example, the doctrines have been used in relation to:<sup>42</sup> whether freedom of expression is the subject of unjustifiable interference, particularly where religion is involved;<sup>43</sup> whether assisted suicide should be decriminalised;<sup>44</sup> whether homosexuals should be able to adopt,<sup>45</sup> and the legal status of transsexuals,<sup>46</sup> both areas in which the Court’s decisions have shifted over time from findings of no breach to breach, in the latter case influenced by changes in the international position.<sup>47</sup> Beyond these personal sphere rights, the Court has also deferred to States, on the basis of the margin doctrine, in relation to politically sensitive issues such as questions of public emergency<sup>48</sup> and, for example, regarding the right to property<sup>49</sup> or planning policy.<sup>50</sup> By contrast, the Court viewed the *Sunday Times v United Kingdom* case (which concerned a prohibition on a publication to prevent a ‘contempt of court’) as raising the ‘far more objective notion of the “authority” of the judiciary’, in relation to which ‘domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground... [which is] reflected in a number of provisions of the Convention, including Article 6, which have no equivalent as far as “morals” are concerned’.<sup>51</sup>

The reproductive cases themselves typically exemplify the approach to the margin and consensus doctrines expressed in *Evans v United Kingdom* (hereafter *Evans*) (which concerned a dispute over the use of frozen embryos).<sup>52</sup> There the Court stated that although the margin will be *limited* where ‘a particularly important facet of an individual’s identity or existence is at stake’, it will also be *wider* ‘[w]here... there is no consensus... either as to the relative importance of the interest... or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues’.<sup>53</sup> The specific application of these points is discussed at various stages of the

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<sup>41</sup> Letsas, n 19 above, 722.

<sup>42</sup> Regarding the case law in this paragraph, see generally discussion in Letsas, n 19 above, 722-729 and Harris, n 3 above, 14-17 and further chapters therein on the relevant articles.

<sup>43</sup> Eg *Wingrove v United Kingdom* (1997) 24 EHRR 1.

<sup>44</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1.

<sup>45</sup> Eg *Frette v France* (2004) 38 EHRR 438.

<sup>46</sup> Eg *Rees v United Kingdom* (hereafter *Rees*) (1987) 9 EHRR 56.

<sup>47</sup> Respectively, *E.B. v France* (2008) 47 EHRR 21 and *Christine Goodwin v United Kingdom* (hereafter *Goodwin*) 35 EHRR 447.

<sup>48</sup> Eg the case law on derogation under Article 15, such as *Ireland v United Kingdom* (1979-80) 2 EHRR 25.

<sup>49</sup> Eg *James v United Kingdom* (1986) 8 EHRR 123.

<sup>50</sup> Eg *Gillow v United Kingdom* ((1986) 11 EHRR 355.

<sup>51</sup> (1979-80) 2 EHRR 245, para 59, as noted by Letsas, n 19 above, 725.

<sup>52</sup> 46 EHRR 34.

<sup>53</sup> *Ibid* para 77.

analysis below, which identifies major problems in the application of the margin and consensus doctrines in the Court's reproductive jurisprudence.

## REPRODUCTIVE MORALS AND MARGINS AT THE COURT

This section analyses the Court's use of the margin and consensus doctrines in some of its leading cases relating to avoiding reproduction and to achieving it.

### Avoiding reproduction: abortion

The Court's abortion jurisprudence hinges on its currently flawed understanding of the relationship between Articles 8 and 2 as these apply to the pregnant woman and the fetus respectively. This section briefly takes these in turn, before considering the central issue – the relationship between them.

#### *The pregnant woman and the fetus: articles 8 and 2*

[P]regnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus.<sup>54</sup>

It has taken a long time for the Court to progress beyond this ambiguous and still disputed statement in the 1981 case of *Brüggemann and Scheuten v Germany* (hereafter *Brüggemann*).<sup>55</sup> Gradually, the clearer approach of the dissenting Judge Fawcett has prevailed: that pregnancy – including its beginning and termination – are private matters, interference with which must be justified under Article 8(2), if possible.<sup>56</sup> In 2010 in *A, B & C v Ireland* (hereafter *A, B & C*) the Court cited the *Brüggemann* passage above but held that, 'nevertheless', the prohibition on abortion for health or wellbeing reasons constituted an interference in private life, including 'the right to personal autonomy and to physical and psychological integrity',<sup>57</sup> an approach confirmed in *RR v Poland*.<sup>58</sup> Thus, it appears that the Court now holds that pregnancy and termination are private matters and abortion regulation must be justified under Article 8(2). Despite this, there are

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<sup>54</sup> *Brüggemann and Scheuten v Germany* (hereafter *Brüggemann*) (1977) 3 EHRR 244, para 59.

<sup>55</sup> Ibid. See eg the different recent interpretations by E. Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights', (2011) 11:3 HRLR 556-566, 559-560; and by C. Zampas and J.M. Gher, 'Abortion as a Human Right – International and Regional Standards', (2008) 8:2 Hum Rts L Rev, 249-294, 276.

<sup>56</sup> *Brüggemann*, para 59.

<sup>57</sup> *A, B & C*, para 216, my emphases. For interpretations of this point see Wicks, n 55 above, 560; D. Fenwick, 'The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights', (2013) 12:3-4 Med Law Int 249-276, 268.

<sup>58</sup> (2011) 53 EHRR 31, para 181.

very significant flaws in its assessment of Article 8 in the abortion context. Before turning to these, I note the Court's approach to the fetus and Article 2.

Since a pregnant woman carries a developing fetus, the question of whether the latter has any legal interests or rights arises. The Court's approach again originates in the Commission's jurisprudence, in cases such as *Paton v United Kingdom* (hereafter *Paton*);<sup>59</sup> however, it has progressed little, if at all, beyond this. In *Paton*, the Commission dismissed the idea that the fetus could have an absolute right to life that would take precedence over a pregnant woman's and avoided directly deciding whether Article 2 applies to the fetus. It held that, assuming that Article 2(1) – the first sentence of which states that '[e]veryone's right to life shall be protected by law' – applies in the early stages of pregnancy, 'the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus'.<sup>60</sup> Although the Commission's answer is based on the *assumed* application of Article 2, in endorsing the legality of the termination in *Paton*, it effectively held that, at least in the early stages of pregnancy, any fetal rights under Article 2 would cede to a woman's interests in life or health.

Aspects of its analysis were echoed in *Vo v France* (hereafter *Vo*).<sup>61</sup> Significantly, despite being the decision that underpinned the Court's analysis in *A, B & C* (discussed below), *Vo* was *not* about abortion, or any other form of maternal-fetal conflict. Rather, it concerned negligent third-party harm to a fetus when a doctor attempted to remove an intra-uterine device from a pregnant woman whom he had mistaken for another patient, ending her wanted pregnancy. So, not only were maternal and fetal interests aligned,<sup>62</sup> but the moral and legal balance of interests *between* a pregnant woman and the fetus, including under Articles 8 and 2, was *not* in issue in *Vo* itself.<sup>63</sup> This is important as regards both the significance of *Vo* in its own right, and the Court's use of *Vo* – which has been highly influential – in its subsequent reproduction jurisprudence.

The Court in *Vo* was very aware that the case did not concern a balance between maternal and fetal interests, and of its novelty, asking 'whether it... [was] advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides

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<sup>59</sup> (1981) 3 EHRR 408, in which a husband failed to obtain an injunction restraining his wife from having an abortion; see also eg *X v the United Kingdom* (1980) 19 DR 244.

<sup>60</sup> *Paton*, para 23. S 1(1) of the Abortion Act 1967 permitted 'the termination of a pregnancy by a registered medical practitioner if two registered medical practitioners find: (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman... greater than if the pregnancy were terminated'.

<sup>61</sup> (2005) 40 EHRR 12.

<sup>62</sup> As the Court itself recognises, *ibid* para 87.

<sup>63</sup> Cf *A, B & C*.

that the law must protect “everyone’s right to life”<sup>64</sup>. This wariness is understandable. Even where the balance between maternal and fetal interests is not directly at issue – as it is not where a third party is responsible for fetal harm – the question of the fetus’s legal claims, if any, is complicated by its place inside the pregnant woman: case law findings as to the fetus’s legal status have the potential to be used in cases that directly concern the maternal-fetal relationship.<sup>65</sup> While granting the fetus significant rights, including under Article 2, would not be problematic as regards the fetus’s relationship to *third* parties who may harm it, to do so could conflict with the balance of maternal and fetal rights established in the context of abortion and in other instances of maternal-fetal conflict. Given third-party representations made in *Vo*, this likely explains the Court’s reluctance to say much about the fetus under Article 2, and to defer to the margin of appreciation.<sup>66</sup> It stated that ‘there is no European consensus on the scientific and legal definition of the beginning of life’, and that the only point of agreement is that the embryo or fetus ‘belongs to the human race’.<sup>67</sup> Here it referred to the context of embryo research.<sup>68</sup> However, the justification for doing so is unclear: an embryo is less developed than any fetus; furthermore, outside the woman’s uterus, issues of maternal-fetal conflict are much less likely to arise.<sup>69</sup> More recently, in *Parrillo v Italy*, the Court has also stated that a wider margin will apply in the context of embryo research than in that of reproduction, on the basis that donation of embryos to research is not a ‘core right’ under Article 8 as it does not concern a ‘particularly important aspect of the individual’s existence and identity.’<sup>70</sup> Thus, approaches to embryo research are not necessarily relevant or determinative in related but distinct contexts. Referring also to a range of ongoing developments in France itself, including regarding embryo research and third-party liability for fetal harm, the *Vo* Court concluded that it was ‘neither desirable, nor even possible’ to decide the issue before it in ‘abstract’ terms;<sup>71</sup> therefore, even if Article 2 were applicable, in this case it had not been violated.<sup>72</sup>

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<sup>64</sup> *Vo*, para 81.

<sup>65</sup> See eg R. Scott, ‘Maternal Duties toward the Unborn? Soundings from the Law of Tort’, (2000) 8:1 Med L Rev 1-68 and references to case law and literature therein.

<sup>66</sup> *Vo*, paras 60-73. See also K. O’Donovan, ‘Commentary: Taking a Neutral Stance on the Legal Protection of the Fetus – *Vo v France*’, (2006) 14:1 Med L Rev 115-123, 120. Note the Separate Opinion of Judge Rozakis, joined by Judges Caflisch, Fischbach, Lorenzen and Thomassen regarding the inapplicability of Article 2 to the fetus.

<sup>67</sup> *Vo*, paras 82 and 84 respectively.

<sup>68</sup> *Ibid*, referring back to paras 39 and 40.

<sup>69</sup> These could arise, at least in an ethical sense, in a less direct way: for example, a woman’s embryos might be said to have an interest in being transferred into her uterus (though whether embryos have interests requires discussion), and she in not having them transferred (for instance because she has ‘completed’ her family).

<sup>70</sup> (2016) 62 EHRR 8, paras 175, 174.

<sup>71</sup> *Vo*, para 82.

<sup>72</sup> *Ibid* para 95.

Vo's emphasis on the lack of a 'European consensus on the scientific and legal definition of the beginning of life' was subsequently critical to the Court's reasoning in the very different abortion context of *A, B & C*, the Court's most important relatively recent abortion case.

*The margin of appreciation and consensus: the maternal-fetal legal balance*

This section critiques the Grand Chamber's highly problematic use of the margin and consensus doctrines in *A, B & C*.

The case concerned three claims under Article 8. With regard to the first and second applicants, who sought abortions on health and wellbeing grounds, using a negative analysis and referring to *Handyside*,<sup>73</sup> the Court emphasised the aim of protecting the 'profound moral beliefs' of the Irish people, which it did not accept had changed significantly since the 1983 referendum supporting the current constitutional framework,<sup>74</sup> and found no breach 'having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland'.<sup>75</sup> This was contrary to recommendations in the Council of Europe's 2008 resolution on abortion and is a much-criticised finding.<sup>76</sup> As regards the third applicant, who was concerned about a risk to her life if her pregnancy continued, the Court found a breach of Ireland's positive obligations given 'the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion'.<sup>77</sup> Although Ireland subsequently clarified its law with the Protection of Life During Pregnancy Act 2013, not surprisingly in 2017 a report of the Commissioner for Human Rights of the Council of Europe strongly criticised Ireland's continued highly restrictive abortion regime,<sup>78</sup> noted that public opinion increasingly favours a more liberal

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<sup>73</sup> *A, B & C*, paras 219-242, citing *Handyside* in para 223.

<sup>74</sup> Such evidence as there was of public opinion is reviewed in *ibid* paras 224-226. Article 40.3.3 of the Constitution states: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

<sup>75</sup> *Ibid* para 241.

<sup>76</sup> Council of Europe (2008) n 8 above, para 4: '[A]bortion "tourism"... is costly, and delays the timing of an abortion and results in social inequities.' See also eg J. Erdman, 'Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach', (2011) 34 Harv JL & Gender 413-462, 460-461; D. Fenwick, "'Abortion jurisprudence" at Strasbourg: Deferential, Avoidant and Normatively Neutral?', (2014) 34 LS 214-241, 228; Wicks, n 55 above, 557 regarding not so much the 'right' but the 'requirement' to travel, 563; S. Krishnan, 'Case Comment – What's the Consensus: The Grand Chamber's Decision on Abortion in *A, B and C v Ireland*', (2011) EHRLR 200-205, 204.

<sup>77</sup> *A, B & C*, para 267.

<sup>78</sup> Council of Europe (2017) n 8 above. See esp s 2.3, entitled 'Women's Sexual and Reproductive Health and Rights', reflected in the report's 'Summary', at 2, which 'recommends decriminalising abortion within reasonable gestational limits'.

law and the work of the Citizen's Assembly on the Eighth Amendment of the Constitution,<sup>79</sup> and urged law reform.

Turning to the core of the Court's analysis in relation to the first two applicants, seemingly promisingly it first noted the extent of the consensus among Contracting States<sup>80</sup> and the trend toward further liberalisation.<sup>81</sup> However, it then held that the consensus did not 'decisive[ly]' reduce the 'broad' margin.<sup>82</sup> Rather, in a critical passage the Court stated:

Of central importance is the finding in the... *Vo* case... that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected... the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor...<sup>83</sup>

The Court reasons as follows: first, relying on *Vo*, there is no consensus as to the legal (and scientific) definition of the start of life, so that whether the fetus is a person to be protected by Article 2 cannot be answered and thus falls within States' margin of appreciation; second, fetal rights and a pregnant woman's rights are 'inextricably interconnected'; therefore, third, the margin in respect of Article 2 *also* implies a broad margin in relation to the legal scope of a woman's interests and rights under Article 8; accordingly, fourth, the degree of consensus that *does* exist regarding the legal grounds for abortion does not reduce the margin and thus does not determine the legality of abortion regulation in any given State.

This argument is flawed: although the Court speaks in terms of interconnection between fetal and maternal interests and rights, its argument in fact assumes that the Article 2 question has *logical priority*. However, this could only be so if abstract positions regarding the legal status of

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<sup>79</sup> Ibid para 83. The report notes that a Citizen's Assembly on the Eighth Amendment of the Constitution would report to the government in April 2017, para 87. For details of the 22-23 April 2017 voting strongly in favour of law reform, see <https://www.citizensassembly.ie/en/Meetings/Fifth-Meeting-of-the-Citizens-Assembly-on-the-Eighth-Amendment-of-the-Constitution.html>.

<sup>80</sup> '[T]he first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30... States. The first... could have obtained an abortion... on health and well-being grounds in approximately 40... States and the second... on well-being grounds in some 35 ... States. Only 3 States have more restrictive access... than in Ireland, namely a prohibition... regardless of the risk to the woman's life.' *A, B & C*, para 235.

<sup>81</sup> Ibid para 112.

<sup>82</sup> Ibid para 236.

<sup>83</sup> Ibid para 237, cited with approval in *RR v Poland*, para 186.

the fetus, *independent* of its place within a pregnant woman, were tenable. Yet, as Thomson pointed out 46 years ago in the philosophical abortion debate, the moral status of the fetus cannot be settled ‘in advance’, without regard to its location inside a pregnant woman: the question of the interests and rights, if any, of the fetus is related to the question of the duties, if any, that the pregnant woman owes it.<sup>84</sup> In turn, given the fetus’s location inside the pregnant woman, any *legal* position on abortion must necessarily attend *both* to the pregnant woman and to the fetus. This means that there is no ‘abstract, logically prior’ question of the fetus’s legal status.<sup>85</sup> Under the Convention, then, where the maternal-fetal legal balance is in issue, the question of fetal rights under Article 2 and a pregnant woman’s rights under Article 8 are intrinsically linked. Indeed, the *A, B & C* Court *itself* accepted this at the start of the passage above, beginning ‘[s]ince the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected...’. However, the majority then failed (or was reluctant) to recognise that, by the same token, any given findings regarding a *pregnant woman’s* legal interests and rights will have implications for the degree to which *fetal* legal interests and rights are recognised, as the Commission’s guarded approach in *Paton* shows. This will be very evident where the maternal-fetal legal balance is in issue as, by definition, it *is* regarding abortion but, again, as it was *not* in *Vo*. If *Vo* itself had been decided *after* the consensus regarding the regulation of abortion among States had been made so explicit by the ECtHR in *A, B & C*, the *Vo* Court could well have deployed the consensus point to note that the fetus – given its place in the uterus of a pregnant woman – can have *at best* limited interests and rights under Article 2. Instead, and paradoxically, the *Vo* Court’s reluctance to say much about the fetus was instead used by the majority in *A, B & C* to avoid the necessary implications of the consensus point under Article 8.<sup>86</sup> So what should be the correct legal position under the Convention as regards abortion?

As the *A, B & C* Court clearly acknowledged, there *is* a European consensus, based on the law in all but three Contracting States, that abortion should be available on broader grounds than the protection of a pregnant woman’s life. Given the interrelated nature of maternal and fetal interests and rights, this means that the majority of Contracting States have established a maternal-

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<sup>84</sup> J.J. Thomson, ‘A Defence of Abortion’, (1971) 1 Phil & Pub Aff 47-66. An immediate opponent, John Finnis, thus had to critique her arguments regarding the non-absolute nature of a woman’s duties in his ‘The Rights and Wrongs of Abortion: A Reply to Judith Thomson’, 2 Phil & Pub Aff (1973) 117-145.

<sup>85</sup> Cf Krishnan, n 76 above, 203 referring to the Court distinguishing the ‘logically prior, abstract question’ of whether the fetus is ‘a “life” to be protected at all’.

<sup>86</sup> Ironically, writing before *A, B & C*, Zampas and Gher, n 55 above, 293, suggested that *Vo* would be a positive development for abortion law.

fetal legal balance in which a woman's interests in health and wellbeing can outweigh the fetus's in life. Accordingly, the fetus has *at best* a limited interest in or right to life under Article 2.<sup>87</sup> Rebutting this conclusion entails ignoring the relevance of the established consensus to the margin of appreciation doctrine, and with it the notion of the Convention as a 'living' and 'evolving' instrument.<sup>88</sup> Indeed, the joint (part) dissent noted that this was 'one of the rare times' that the Court had done so,<sup>89</sup> with negative implications for the project of harmonisation.<sup>90</sup> Importantly then, for the purposes of the Court's approach to the first and second applicants in *A, B & C*, the margin of appreciation in relation both to the Article 8 and Article 2 points had been *narrowed* by the legal situation in the majority of Contracting States. The Court failed to recognise, at least openly and in such a way as to be determinative, this very important point. Thus, the *relationship between* the woman's and the fetus's interests and rights under Articles 8 and 2 respectively constitutes the essence of abortion law under the Convention.

The Court's failure to acknowledge the reduction in the margin appears to have been recognised by the joint (part) dissent in *A, B & C*, which rightly criticised the majority for putting so much weight on the supposed lack of consensus regarding when human life begins and whether the fetus has a right to life under Article 2:

Let us make clear... that... [t]he issue... was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States... to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus... Consequently, we believe that the majority erred when it inappropriately conflated... the question of the beginning of life (and as a consequence the right to life), and the States' margin of appreciation in this regard, with the margin of appreciation that States have in weighing the right to life of the foetus against the right to life of the mother or her right to health and well-being.<sup>91</sup>

The meaning of the last section is not entirely clear. However, the joint (part) dissent apparently recognised that the consensus that does exist regarding a pregnant woman's interests and rights

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<sup>87</sup> On the 'implicit' positions on the legal status of the fetus in states' abortion laws, see also Fenwick, n 76 above, 221.

<sup>88</sup> As Arai-Takahashi, n 4 above, 100, notes, referring to the Court's consideration of 'cultural justifications'. The approach is described as 'exceptionally relativistic' by Fenwick, n 76 above, 215. Wicks, n 55 above, describes it as a 'startling departure from its previous practice', 561, that is 'unwelcome', 562.

<sup>89</sup> *A, B & C*, Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, paras 6 and 5.

<sup>90</sup> Discussed in *ibid* para 5.

<sup>91</sup> *Ibid* para 2.



under Article 8 has necessary implications for those of the fetus under Article 2 in the abortion context. It described the majority's deference to (the Irish government's representations as to) the 'profound moral views' of the Irish people as a 'real and dangerous new departure', noting that the Court's case law had not previously distinguished between moral and other beliefs with respect to the margin.<sup>92</sup> The special weight that, drawing on *Handyside*, the majority gives to the government's statement of these views is troubling: it wrongly implies that, by describing these as 'profound', they amount to some 'free-standing entity' which can be 'sealed off' from the moral interests at stake in a woman's Article 8 rights. Since a fetus develops inside a pregnant woman, this is not the case.<sup>93</sup> In any event, as the Commissioner for Human Rights' March 2017 references to Irish opinion polls and the work of the Citizen's Assembly (confirmed in the subsequent April voting that was strongly in favour of law reform) show, the notion of 'profound moral views' might well be seen as a construct that bears little relation to the actual views of the Irish people.<sup>94</sup>

I consider further aspects of the Court's flawed approach in the abortion context after a discussion of reproductive donation, in which its reasoning on the margin and consensus doctrines – which builds to some extent on *A, B & C* – is likewise highly problematic.

### **Medically assisted reproduction: reproductive donation**

Together with the European consensus, the margin of appreciation is... the other pillar of the Grand Chamber's reasoning... Ultimately, through the combined effect of the European consensus and the margin of appreciation, the Court has chosen a minimum – or even minimalist – approach that is hardly likely to enlighten the national courts.<sup>95</sup>

While this could have referred to the majority in *A, B & C*, it was written the following year, in *S.H. v Austria* (hereafter *S.H.*), by the stingingly critical Grand Chamber joint dissent. The case, in which the Court accepted that the right to private and family life was invoked,<sup>96</sup> concerned the interest in reproducing and the medical assistance that may be needed to achieve this, with particular reference to donated gametes.

Two couples made claims. To have a child to whom one parent would be genetically related, the first needed IVF and sperm donation, the second IVF and ovum, or egg, donation.<sup>97</sup>

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<sup>92</sup> Ibid para 9.

<sup>93</sup> This leaves to one side the remote possibility of ectogenesis.

<sup>94</sup> See above text preceding n 79, and n 79 itself.

<sup>95</sup> *S.H.*, Joint Dissenting Opinion, para 11.

<sup>96</sup> *S.H.*, para 82.

<sup>97</sup> Ibid, paras 10-12.

However, both couples were confronted with prohibitions against the use of donated gametes in Austrian law: against sperm donation when IVF was also needed, and against ovum donation (which can only occur with IVF).<sup>98</sup> The couples lodged a joint but unsuccessful case with the Austrian Constitutional Court in 1998; in 2000, they filed a case with the ECtHR, leading to a 2010 Chamber judgment that found a breach of Article 14, read in conjunction with Article 8, as regards all the applicants, and found it unnecessary separately to consider the application of Article 8;<sup>99</sup> however, the Grand Chamber ultimately ruled against them in 2011. The protracted time-frame of the case is relevant to the Court's approach to one of the 'twin pillars' – the use the Court made of the consensus doctrine.

The applicants argued that 'the special importance of the right to found a family and the right to procreation' meant that Contracting States had no margin in their regulation of these matters.<sup>100</sup> However, while the Court accepted that the margin will be reduced when 'a particularly important facet of an individual's existence or identity' is invoked,<sup>101</sup> citing *Evans* and its flawed decision in *A, B & C*, it rapidly deployed the notion of consensus to widen the margin again and, as will be seen below, simply avoided proper consideration of the importance of the interests at stake.<sup>102</sup>

#### *The margin of appreciation and consensus: time, numbers, and the pace of medical developments*

The Court's assessment of consensus hinged on time and numbers in relation to the pace of medical developments.

Regarding *time*, it noted the 'many [medical] developments' since 1998 which 'might... have repercussions' on its assessment,<sup>103</sup> but stated that the question concerned justification 'at the time',<sup>104</sup> an approach Scherpe describes as 'an inexplicable and unnecessary departure from previous case law'<sup>105</sup> that in any event contradicts the Court's statement 'that the Convention has always been interpreted and applied in the light of current circumstances'.<sup>106</sup> Although the majority

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<sup>98</sup> S 3(1) and 3(2) of the Artificial Procreation Act.

<sup>99</sup> *S.H. v Austria* (2011) 52 EHRR 6 (hereafter *S.H.* (Chamber)).

<sup>100</sup> *S.H.*, para 93.

<sup>101</sup> *Ibid* para 94, citing *Evans*, para 77.

<sup>102</sup> *Ibid*, citing *Evans*, para 77, and other cases.

<sup>103</sup> *S.H.*, para 84.

<sup>104</sup> *Ibid*.

<sup>105</sup> J.M. Scherpe, 'Medically Assisted Procreation: This Margin Needs to be Appreciated', (2012) CLJ 276-279, 278.

<sup>106</sup> *S.H.*, para 118, citing *Rees*.

held that it could ‘have... regard to subsequent developments’,<sup>107</sup> as the joint dissent noted and the analysis below shows, this last point ‘remains a dead letter in actual fact’.<sup>108</sup>

On *numbers*, it first stressed what it represented as significant changes in the numbers of Member States prohibiting ovum and sperm donation between 1998 and 2011: in 1998 ovum donation was prohibited in seven and sperm donation in four (apart from Austria in both cases).<sup>109</sup> These figures make little sense if not put in context. Since the Council of Europe had 40 Member States in 1998,<sup>110</sup> ovum donation was *permitted* in 32 States (80 per cent), and sperm donation in 35 (88 per cent). The Court then noted that, as of 2011, ovum donation was prohibited in five States and sperm donation in three (apart from Austria).<sup>111</sup> Again, context is essential: since in 2011 the Council had 47 Member States,<sup>112</sup> ovum donation was *permitted* in 41 States (87 per cent), and sperm donation in 43 (91 per cent). As for the Court’s take on these differences, it observed: ‘there is now a *clear trend*... which reflects an *emerging European consensus*’.<sup>113</sup> Yet it is far from clear that increases of seven and three per cent respectively, particularly the latter and viewed in relation to the starting percentages in each case, demonstrate any very significant change. In any event, as a paper by the Organising Committee for a 2008 *Dialogue between Judges* notes, ‘consensus does not mean unanimity’.<sup>114</sup> Accordingly, it would be fairer to attribute a consensus at least to 1998, the year the claimants lodged their case with the Austrian Constitutional Court, as the joint dissent’s criticisms also suggested, which noted ‘that the data at the relevant time mainly support the *opposite* approach, and without taking into consideration the... [subsequent] developments.’<sup>115</sup>

The majority then sought to defend the notion that there was at best an ‘emerging’ consensus and thereby to reject any narrowing of the margin of appreciation: it suggested that this consensus ‘is not... based on settled and long-standing principles’, but only indicates a ‘stage of

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<sup>107</sup> Ibid, para 84.

<sup>108</sup> S.H., Joint Dissenting Opinion, para 4.

<sup>109</sup> S.H., para 95, citing Council of Europe, ‘Medically Assisted Procreation and the Protection of the Human Embryo: Comparative Study on the Situation in 39 States’, Strasbourg 4 June 1998, CDBI/INF (98) 8.

<sup>110</sup> Council of Europe, ‘Our Member States’, <https://www.coe.int/en/web/about-us/our-member-states>. Croatia joined in 1996 as the 40<sup>th</sup>, and Georgia in 1999 as the 41<sup>st</sup>.

<sup>111</sup> S.H., para 95.

<sup>112</sup> Council of Europe, n 110 above.

<sup>113</sup> S.H., para 96, emphases added.

<sup>114</sup> Rather, ‘[i]t is more an expression of the common ground required for the collective approach underlying the Convention system and the interaction between the European and domestic systems’. ‘The Role of Consensus in the System of the European Convention on Human Rights’ in ECtHR, Council of Europe (2008) n 4 above, no page numbers in original. We can see this in *A, B & C* itself, in which the Court accepted that there was a consensus under Article 8 amongst member States that abortion should be available on maternal health and wellbeing grounds, although three States in addition to Ireland did not permit this.

<sup>115</sup> S.H., Joint Dissenting Opinion, para 10, emphasis added.

development within a particularly dynamic field of law’, so that the margin is not ‘decisively narrow[ed]’.<sup>116</sup> This is rightly the subject of particularly cutting criticism by the joint dissent, which held that this ‘unprecedented’ move ‘confer[s]... a new dimension on the European consensus and applies a particularly low threshold to it, thus potentially extending the States’ margin... beyond limits’, a step that, unsurprisingly, it labels as ‘backward’.<sup>117</sup> In an attempt to maintain a broad margin, the majority also invoked its prior characterisation in *Evans* of the IVF context as subject to ‘fast-moving medical and scientific developments’.<sup>118</sup> Yet this point was irrelevant to the issues at hand, since both sperm and ovum donation had been possible and widely permitted for many years, a point that applied also in *Evans* in relation to IVF *per se*. Furthermore, for three reasons the decision in *Evans* is of limited relevance to *S.H.* The issue there concerned consent procedures in the IVF context, particularly whether a man should be able to withdraw his consent to the use of an embryo created with his sperm, including in a situation where this would destroy a woman’s last chance to have a genetically related child.<sup>119</sup> First, then, *Evans* primarily concerned a *clash* of Article 8 rights that directly pulled in opposing directions, albeit in the context of competing public interests, for instance in legal certainty; second, while *Evans* concerned a very important point with highly significant implications for the parties involved, it did not concern a generic *prohibition* on the provision of a treatment, as *S.H.* did; and third, in *Evans* no consensus was (rightly) found amongst the Contracting States (or further afield) on the consent point.<sup>120</sup>

### *The margin of appreciation and morals*

The second strand of the Court’s reasoning attempted to shore up the supposed breadth of the margin by giving credence to a cluster of familiar but doubtful moral objections raised by the Austrian Government.

Debates regarding reproductive technologies invariably include concerns relating to the unpromising<sup>121</sup> objection of ‘naturalness’ and *S.H.* is no exception. The Court noted and effectively endorsed several of the Government’s arguments, for instance: ‘that medically assisted procreation

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<sup>116</sup> *S.H.*, para 96.

<sup>117</sup> *S.H.*, Joint Dissenting Opinion, para 8.

<sup>118</sup> *S.H.*, para 97, asserting that since ‘the questions raised... touch on areas where there is *not yet clear common ground* among the member States... the margin... must be a wide one’. Emphasis added.

<sup>119</sup> As both the original Human Fertilisation and Embryology (HFE) Act 1990 and the HFE Act as amended by the HFE Act 2008 allow: Sched 3, para 4, with continued storage being lawful under the amended Act for up to 12 months: para 4(4). On *Evans* see further S. Sheldon, ‘*Evans v. Amicus Health Care: Revealing Cracks in the “Twin Pillars”*’, (2004) 16 CFLQ 437-452.

<sup>120</sup> *Evans*, para 79.

<sup>121</sup> See eg J. Baggini, *Making Sense: Philosophy behind the Headlines* (OUP, 2002) 4.

should take place *similarly to natural procreation*, and... that the basic principle of civil law – *mater semper certa est* – should be maintained’;<sup>122</sup> that there was ‘*unease* among large sections of society as to the role and possibilities of modern reproductive medicine’;<sup>123</sup> and that gamete donation involves third parties ‘in a *highly technical* medical process... which had to take into account human dignity, [and] the well-being of children thus conceived...’.<sup>124</sup> Particularly when used to constrain rather than empower, references to dignity are typically vague, as Brownsword has highlighted.<sup>125</sup> Unsurprisingly, in *S.H.* dignity appears in its former guise, not only in the majority judgment, but also in Judge de Gaetano’s Separate Opinion: in artificial insemination, he stated, ‘[h]uman procreation, instead of being a personal act between a man and a woman, was *reduced* to a medical or laboratory technique’.<sup>126</sup> This is powerful, potentially insulting, language, aligning dignity and ‘naturalness’. Regarding the welfare of the child, the Court focused on the ‘splitting of motherhood’ and ‘unusual family relations’, implying a risk of harm to the future child.<sup>127</sup> Yet extensive empirical literature shows that there is no reason to have particular concern for the welfare of children born from donated gametes.<sup>128</sup> Finally, the Court’s comments regarding the possibility of risks to and exploitation of women from ovum donation ignore the capacity of regulation (thus, less restrictive alternatives) to deal with such issues, a point on which the Chamber majority placed considerable reliance.<sup>129</sup> Overall, the Court endorsed question-begging objections, bluntly directed at medically assisted reproduction in general, that would not withstand

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<sup>122</sup> *Ie*, ‘by avoiding the possibility that two persons could claim to be the biological mother of one and the same child and to avoid disputes between a biological and a genetic mother in the wider sense’. *S.H.*, para 104, first emphasis added; second in original.

<sup>123</sup> *Ibid* para 104, emphasis added.

<sup>124</sup> *Ibid* para 113, emphasis added.

<sup>125</sup> R. Brownsword, ‘Regulating Human Enhancement: Things Can Only Get Better?’, (2009) 1:1 *Law, Innovation and Technology*, 125-152, 129. On the positive role of dignity in relation to human rights, see eg Tasioulas, n 31 above, 50-56.

<sup>126</sup> *S.H.*, Separate Opinion of Judge de Gaetano, para 3, emphasis added; he refers to ‘dignity’ in para 2.

<sup>127</sup> The Grand Chamber at first acknowledged the legal institution of adoption, observing that a satisfactory legal framework could have been established in relation to ovum donation. *S.H.*, para 105. It ignored the point that Austria’s legally permitted *in vivo* sperm donation – regarding which it accepted the Government’s argument that for pragmatic reasons it would be hard to prohibit – results in ‘split fatherhood’. It said the discrepancy in fact ‘shows rather the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field’. *S.H.*, para 114. Cf the Court’s criticisms of inconsistency in Italy’s regulation of preimplantation genetic diagnosis (PGD) on the one hand and selective termination on the other in *Costa and Pavan v Italy* (hereafter *Costa*) (App No 54270/10) (2012).

<sup>128</sup> See esp S. Golombok’s extensive body of work, eg *Modern Families: Parents and Children in New Family Forms* (Cambridge University Press, 2015). By contrast in *Dickson v United Kingdom* (2008) 46 EHRR 41 (hereafter *Dickson*), which concerned access to artificial insemination facilities by a husband who was in prison and his wife who was not, while the court accepted the welfare of the future child as a legitimate aim under Article 8(2), it held that the UK government’s concerns as to the absence of the imprisoned future father could not justifiably prevent conception, given that Dickson’s wife could care for the child until his release, para 76. In any event, the implications of the ‘non-identity’ problem should be considered: twinning aside, any given embryo or fetus can only be born as one particular person and, on a widely accepted view, it is only if s/he is born with a condition that is so severe that any goods in life are outweighed by the burdens that s/he can complain about being born. See further D. Parfit, *Reasons and Persons* (OUP, 1984) ch 16.

<sup>129</sup> *S.H.*, para 105; cf *S.H.* (Chamber), para 77-78.

analysis under Article 14, as the Chamber's judgment shows.<sup>130</sup> Together, they illustrate Letsas's and Benvenisti's concerns as to the operation of the moral preferences of the majority in relation to the margin and consensus doctrines.<sup>131</sup>

The majority's last plank in defence of a broad margin again borrowed from *A, B & C*: here it likewise deployed the tactic of saying that the applicants can always go abroad.<sup>132</sup> Just as it was in *A, B & C*, this is a highly problematic position that has been critiqued with reference to various cross-border reproductive healthcare issues.<sup>133</sup> The Court's glib attempt to use what Erdman has, with reference to *A, B & C*, described as a 'harm reduction' approach, was used supposedly to strengthen its 'hands off' approach to Austria's highly conservative position on assisted reproduction,<sup>134</sup> enabling Austria morally and legally to continue to 'freeride' on the much more permissive position in the vast majority of Contracting States. Since the Court also noted that Austria could easily address the parentage issues at birth when a couple (or single applicant) returns to Austria, to some extent it thereby undermined its own acceptance of the Austrian Government's position that a split between the genetic and gestational mother in this context is problematic.<sup>135</sup>

In sum, by downplaying the legal consensus among Contracting States and endorsing the Austrian Government's weak moral and legal arguments, the Court never assessed the *proportionality* of the alleged necessity of the interference in the applicants' rights.<sup>136</sup> Furthermore, lacking from its judgment was any discussion, let alone recognition, of the seriousness of the applicants' needs, which were insufficiently addressed by the gesture that they could go abroad.<sup>137</sup> In both *S.H.* and *A, B & C*, the Court's use of the margin and consensus doctrines involved a

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<sup>130</sup> *S.H.* (2010) paras 85 and 94.

<sup>131</sup> Letsas, n 19 above, 729, and n 29 above, 121; Benvenisti, n 28 above, 847.

<sup>132</sup> *S.H.*, para 114.

<sup>133</sup> E. Jackson, 'Commentary: *SH and others v Austria*', (2012) 25 *Reprod Biomed Online* 663-664, 664; Scherpe, n 105 above, 279, notes the financial resources needed by couples and the 'nonsensical' nature of the position that 'a right is protected because it can be exercised elsewhere'. In the UK, the Human Fertilisation and Embryology Authority (HFEA) now has specific guidance for patients on cross-border treatment: 'Fertility Treatment Abroad', available at <https://www.hfea.gov.uk/treatments/explore-all-treatments/fertility-treatment-abroad/>.

<sup>134</sup> *A, B & C*, para 241; Erdman, n 76 above, 460. She notes, at 461, that '[a] neutral and pragmatic harm reduction approach refuses to engage with abortion as a normative matter.'

<sup>135</sup> I say 'to some extent' because there is a distinction between 'sorting out' legal issues that are the result of practices which a country prohibits, and directly permitting those practices.

<sup>136</sup> Cf the careful review regarding competing private and public interests and the concept of proportionality in *Dickson*, esp para 82.

<sup>137</sup> The Court only advised the Austrian government to keep the area under review, *S.H.* para 118, citing *Rees*, in which the Court warned the UK government to review the area of gender change and the right to marry, and *Goodwin* as illustrative of cases in which the Court moved over time from findings of no breach to breach. Scherpe, n 105 above, notes that this is a warning that the margin is 'shrinking', 279.

failure to understand and protect important dimensions of reproductive health, considered in the next section.

### **REPRODUCTIVE HEALTH AND RIGHTS: INTERESTS, AUTONOMY AND NEEDS**

If the Court's approach in *S.H.* is a prime example of a failure to take interests in medically assisted reproduction seriously, a parallel failure to take the interest in avoiding reproduction sufficiently seriously is present in its abortion jurisprudence, as evidenced in the majority approach in *A, B & C*. The argument below shows that, while the Court has recognised, but not necessarily protected, *autonomy* in the assisted reproduction context, it has not appreciated the health interests at stake. By contrast, while its abortion jurisprudence has recognised, but not necessarily protected, women's *health* interests, it has paid little more than lip service to women's autonomy.<sup>138</sup> In this way, in both contexts the Court has failed to understand and protect the autonomy and needs that are each key components of *reproductive health*, a concept long established at the level of international policy and protected in certain legal conventions.<sup>139</sup> Incorporating the concept of reproductive health in moral and legal debate assists in developing broader understanding of the importance of various reproductive interests, supporting a case for their recognition and protection and, importantly, defusing conflicts that may be invoked in debates either as to the legalisation, or the legal scope, of a given practice.<sup>140</sup>

Two central reproductive interests are of concern here: achieving and avoiding reproduction. Having and raising a child or children together with another person, or by oneself, of course entails the creation of new people, with attendant relationships and parenting roles over a sustained period of time. The ability to choose to reproduce is typically regarded as centrally important to human flourishing and to a good life, and so the moral importance of having this choice is relatively uncontroversial. At the same time, since reproduction – coupled with child-raising – entails extensive moral obligations that impact on existing relationships and obligations and various life opportunities, people also have an important interest in choosing how often, if at all, to reproduce. This interest too is well recognised.<sup>141</sup>

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<sup>138</sup> As noted also by Fenwick, n 57 above, 273; Zampas and Gher, n 55 above, 265.

<sup>139</sup> On the development of the concept of reproductive health internationally, see R.J. Cook, B. M. Dickens and M.F. Fathalla, *Reproductive Health and Human Rights* (OUP, 2003) and further below.

<sup>140</sup> With particular regard to abortion, see Erdman, n 76 above, 425-426.

<sup>141</sup> For an insightful recent consideration of the value of reproductive liberty in both its negative and positive senses, with reference to key literature, see R. Sparrow, 'Is it "Every Man's Right to Have Babies If He Wants Them"?': Male Pregnancy and the Limits

As discussion in the international context shows, in turn both interests can be understood with reference to the idea of reproductive health. The World Health Organisation (WHO)'s (arguably overbroad) definition of health 'as a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity' is well-known.<sup>142</sup> Situated within this and thus more narrowly construed is its depiction of reproductive health as 'address[ing]... the reproductive processes, functions and system at all stages of life'.<sup>143</sup> As far back as 1988, the WHO stated that reproductive health means (in part) 'that people... have the *capability to reproduce* and *the freedom to decide if, when and how often to do so*'.<sup>144</sup> This understanding was 'adopted and expanded' in UN conferences,<sup>145</sup> leading to wide recognition of the importance of protecting rights relating to reproductive and sexual health in various international conventions.<sup>146</sup>

In the light of the international recognition of the concept of reproductive health, to which the ECtHR is entitled to attend,<sup>147</sup> a concept already embodied in a 2008 Council of Europe resolution on abortion and, more recently, in the Council's Commissioner for Human Rights 2017 report in relation to Ireland,<sup>148</sup> the Court would do well to develop its understanding of reproductive interests under Article 8 with reference to the concept of reproductive health. In so doing, it should attend to the *autonomy* interests and *needs* at stake therein: those with fertility problems cannot choose to reproduce without some form of medical assistance; and women cannot safely choose to terminate without such assistance. The following sub-sections further critique the Court's leading cases concerned with attaining or avoiding reproduction with particular reference to the concept of reproductive health.

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of Reproductive Liberty', noting that '[t]he argument for reproductive liberty... relies for its force on facts about the role that reproduction plays in the normal human life cycle', (2008) 18:3 Kennedy Inst Ethics J 275-299, 286.

<sup>142</sup> Preamble to the Constitution of WHO as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of WHO, No 2, 100) and entered into force on 7 April 1948. For criticism as to the breadth of this definition, see eg J. Tasioulas and E. Vayena, 'The Place of Human Rights and the Common Good', (2016) 37 Theor Med Bioeth, 365-382, 370.

<sup>143</sup> WHO, 'Reproductive Health', [http://www.who.int/topics/reproductive\\_health/en/](http://www.who.int/topics/reproductive_health/en/).

<sup>144</sup> Ibid, emphases added.

<sup>145</sup> See the discussion in Cook and others, n 139 above, 12: the WHO's 1988 definition of reproductive health 'was adopted and expanded' in the Programme of Action developed at the 1995 International Conference on Population and Development (ICPD) and at the International Conference on Women in 1995.

<sup>146</sup> Ibid ch 6 on 'Human Rights Principles', noting particularly the Convention on the Elimination of All Forms of Discrimination against Women, 153. See also the review of the relevant European and international material, including reference to third-party intervenors in *A, B & C*, paras 100-111, including eg the Office of the High Commissioner for Human Rights, Committee on the Elimination of Discrimination against Women (CEDAW); this material is notably lacking in *S.H.*

<sup>147</sup> Eg *Goodwin*, para 85, particularly gave weight to the broader international position; Harris, n 3 above, 10.

<sup>148</sup> Council of Europe (2008), n 8 above, and Council of Europe (2017) n 8 above, s 2.3.



## Medically assisted reproduction

Ultimately, what is at stake here is not a question of *choice* between different techniques but, more fundamentally, a restriction on access to heterologous *in vitro* fertilisation constituting denial of access to available *treatment*.<sup>149</sup>

As the joint dissent in the *S.H.* Grand Chamber understood, this was the core issue in the case. This critical observation followed its reference to the WHO's long-standing work on infertility. The dissent emphasised that a report '*as far back as 2001*'<sup>150</sup> noted that 'one in ten couples experiences primary or secondary infertility' and that this 'central issue' is 'a source of social and psychological suffering for both men and women and can place great pressures on the relationship within the couple'.<sup>151</sup> The International Committee for Monitoring Assisted Reproductive Technology and the WHO describe infertility as 'a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse'.<sup>152</sup> Furthermore, as the WHO's definition of reproductive health makes clear with reference to infertility:

Implicit in [reproductive health]... are the right of men and women... to have... *access to appropriate health care services* that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.<sup>153</sup>

The dissent also stated that it was 'important to recall' relevant parts of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).<sup>154</sup>

Significantly however, whether – or to what extent – assisted reproduction is a form of *treatment* was doubted by the Grand Chamber majority in *S.H.*, which effectively endorsed the 'Artificial Procreation Act[s]... intention to prevent negative repercussions and potential misuse and to employ medical advances for *therapeutic purposes only and not for other objectives such as the "selection" of children*'.<sup>155</sup> The link between the two halves of this sentence is less than clear. The implication may be *either* that medically assisted reproduction

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<sup>149</sup> *S.H.*, Joint Dissenting Opinion, para 9, first and third emphases added; second in original.

<sup>150</sup> *Ibid*, emphasis in original.

<sup>151</sup> *Ibid*, citing E. Vayena, P.J. Rowe and P.D. Griffin (eds), *Current Practices and Controversies in Assisted Reproduction* (World Health Organization, 2002) xv (cited as xiii in the judgment).

<sup>152</sup> F. Zegers-Hochschild and others, 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology, 2009', (2009) 92:5 Fertil & Steril 1520-1524, 1522.

<sup>153</sup> WHO, n 143 above, emphasis added. The WHO has produced a wealth of materials and reports of relevance to these points, at *ibid*.

<sup>154</sup> *S.H.*, Joint Dissenting Opinion, para 9: 'Articles 12 § 1 and 15 § 1 (b) recognise... the right of everyone to enjoy the benefits of scientific progress and its applications, and the right of everyone to enjoy the highest standard of physical and mental health.'

<sup>155</sup> *S.H.*, para 64, emphasis added.

with donated gametes: (a) is not therapeutic; *or* (b) is therapeutic, but may also lead to the ‘selection’ of children, presumed undesirable.

Turning to the first point, despite legal frameworks accepting medically assisted reproduction as a form of ‘treatment’,<sup>156</sup> in *S.H.* the Grand Chamber diminished the function of donated gametes as *treatment* and portrayed their use as aligned with *choice*, thereby disregarding the applicants’ underlying treatment *needs*: it stated that ‘the right of a couple to conceive a child and to make use of medically assisted procreation... is... protected by Article 8, as such a *choice* is an expression of private and family life’.<sup>157</sup> In this way, it significantly downplayed the importance of the interest in being able to achieve the birth of a child (where this is sought). Judge de Gaetano’s Separate Opinion, which referred to the “*desire*” for a child’,<sup>158</sup> suggesting that this could not be allowed to become an ‘absolute goal’ even more strongly (characteristically) ignores the idea of infertility as a negative condition that has serious health impacts and merits treatment.<sup>159</sup> Contrary to the majority’s and Judge de Gaetano’s approaches, the existence of the demoted consensus amongst Contracting States regarding the legal permissibility of IVF using donated gametes itself tells us that by far the majority of Contracting States have decided that such use constitutes *treatment*. This does not mean that choice is not relevant or valuable: an individual or couple may or may not choose (where the option is available) to pursue fertility treatment, with or without donated gametes. Furthermore, an important dimension of the negative psychological impact of infertility concerns the inability to choose, in the absence of successful fertility treatment, to have a child, given that the ability to make this choice is a central feature of a good life.<sup>160</sup> So, missing from the majority’s reasoning is the recognition of infertility as a highly negative impediment to reproductive health, and thus a recognition of infertility as potentially giving rise to treatment *needs*, about which *choices* should be available.

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<sup>156</sup> Eg in the UK, s 2 of the HFE Act 1990 (as amended) defines ‘treatment services’ as ‘medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children’.

<sup>157</sup> *S.H.*, para 71, emphasis added.

<sup>158</sup> *S.H.*, Separate Opinion of Judge de Gaetano, para 2, emphasis added.

<sup>159</sup> Whether, or to what extent, infertility is a *disease* may be contested: see eg A.L. Greil, ‘Infertility and Psychological Distress: A Critical Review of the Literature’, (1997) 45 *Social Science and Medicine*, 1679-1704. However, the argument here only requires that it is regarded as a ‘condition meriting treatment’, as recognised for instance by the Warnock Committee in Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) para 2.4. For recent ethical discussion of infertility and treatment, see S. Wilkinson and N.J. Williams ‘Should Uterus Transplants be Publicly Funded?’, (2016) 42 *JME* 559-565, 560-562.

<sup>160</sup> In *S.H.*, para 9, the Joint Dissenting Opinion cites Vayena and others, n 151 above, xv (cited as xiii in the judgment): ‘It is a source of social and psychological suffering for both men and women and can place great pressures on the relationship within the couple.’

Regarding the second point, while the idea of ‘selection’ may generate concerns about ‘eugenics’, a controversial and well-discussed topic,<sup>161</sup> most Contracting States permit selection to avoid serious disease, for instance in the form of prenatal and preimplantation genetic diagnosis (PND and PGD).<sup>162</sup> In the case of donated gametes (where avoiding disease in the future child is not typically an issue for the couple seeking such assistance) the most likely reason for selection is to achieve some likeness, if possible, to the physical features of the couple seeking treatment, perhaps principally for privacy reasons (at least as regards non-family members) as to the manner of conception.<sup>163</sup> Seen in this way, a degree of selection should be viewed sympathetically with reference to the underlying need. While it may be possible to select in other ways,<sup>164</sup> in the absence of a significant degree of choice between gametes, options will be highly limited. If ever supply were abundant, unlikely to be the case with respect to ovum donation in a system of unpaid donation,<sup>165</sup> selection options would increase. However, as the *S.H.* Chamber majority noted, regulation is the primary answer to any concerns about the possible scope of selection.<sup>166</sup> Thus, the Grand Chamber majority wrongly ignored a less restrictive alternative as part of its failure properly to address the question of proportionality.<sup>167</sup>

The ability to choose *not* to have a child is also central to reproductive health, as the WHO has recognised: ‘Implicit in [reproductive health]... are the right of men and women to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice’.<sup>168</sup> The discussion now considers the concept of reproductive health with reference to the inadequacies of the ECtHR’s abortion jurisprudence.

## Avoiding reproduction

The lawfulness of abortion does not have an effect on a woman’s *need* for an abortion, but only on her *access* to a safe abortion... [T]he *ultimate decision* on whether or not to have an abortion

<sup>161</sup> See discussion in eg S. Wilkinson, *Choosing Tomorrow’s Children: The Ethics of Selective Reproduction* (OUP, 2010) ch 6.

<sup>162</sup> In *Costa*, in which the Court found a breach of Article 8 in relation to Italy’s ban on PGD, the Court notes that only two other member States ban PGD and that this was set to change in one: paras 29, 77.

<sup>163</sup> On prospective and actual parents’ interests in privacy in this context, see Nuffield Council on Bioethics (NCOB), *Donor Conception: Ethical Aspects of Information Sharing* (NCOB, 2013) esp ch 5. (The author was a member of the Working Party which produced the report.) Recognition of such privacy does not necessarily entail withholding the manner of conception from donor-conceived children, nor a privileging of genetic (and social) over social parenthood.

<sup>164</sup> Eg for what may be regarded as positive features such as height.

<sup>165</sup> European Union Tissue and Cells Directive (EUTCD) 2004/23/EC, which requires voluntary, unpaid and altruistic donation. For discussion see eg R. Scott, ‘Egg-sharing, Motivation and Consent: Ethical, Legal and Policy Issues’, in S. Golombok and others (eds), *Regulating Reproductive Donation* (CUP, 2016) 259-289, 279-286.

<sup>166</sup> *S.H.* (Chamber) paras 76-78.

<sup>167</sup> On proportionality generally, see Harris, n 3 above, 519-520.

<sup>168</sup> WHO, n 143 above.

should be a *matter for the woman* concerned, who should have the means of *exercising this right* in an effective way.<sup>169</sup>

As the earlier analysis of *A, B & C* shows, this central message of the Council of Europe's 2008 Resolution (reiterated in its Commissioner for Human Rights 2017 report) on the recognition of the needs and autonomy interests at stake in access to abortion is not consonant with the current approach of the Court, in which procedural analyses relating to health have been dominant.<sup>170</sup> Although the ECtHR has referred to autonomy in cases such as *A, B & C* and *P and S v Poland*,<sup>171</sup> it has not developed its jurisprudence with reference to this concept, as others such as Fenwick, and Zampas and Gher, have also noted.<sup>172</sup> Rather, its cases have been analysed on the basis of the interest in physical and psychological integrity, such as in *Tysic v Poland* (hereafter *Tysic*) which concerned a serious threat to a woman's eyesight from continued pregnancy, which was also highly distressing to her.<sup>173</sup> Although the Court in *Tysic* acknowledged this distress, it has not advanced its understanding of psychological integrity in the abortion context.<sup>174</sup>

While various philosophical accounts of psychological integrity have been developed,<sup>175</sup> given the Court's past interpretations it is doubtful that any is helpful here.<sup>176</sup> In the abortion context, while *physical* integrity most obviously concerns potentially negative impacts of pregnancy and its aftermath on physical health, arguably *psychological* integrity relates to the impact of pregnancy and (if this is continued) childbirth and child-raising on a woman's mental health.<sup>177</sup> Furthermore, given the mental (and physical) demands of each and all of these aspects, at issue in psychological integrity will be the ability to *choose* whether or not to continue a pregnancy; indeed, the negative psychological sequelae of a lack of choice in relation to abortion are well documented.<sup>178</sup> Thus, the ideas of autonomy and psychological integrity are intimately

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<sup>169</sup> Council of Europe (2008) n 8 above, paras 4 and 6, emphases added.

<sup>170</sup> Council of Europe (2017) n 8 above, s 2.3.2. With regard to the dominance of procedural analyses, see Fenwick, n 76 above. See further R. Scott, 'Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law', (2016) 24:1 Med L Rev, 1-33.

<sup>171</sup> [2013] 1 FCR 476.

<sup>172</sup> Fenwick, n 57 above, 273; Zampas and Gher, n 55 above, 265; Wicks, n 55 above, 565.

<sup>173</sup> 45 EHRR 42.

<sup>174</sup> Consider eg the cases of the unsuccessful first two applicants in *A, B & C*, who sought terminations on 'health and wellbeing' grounds.

<sup>175</sup> See eg 'Integrity' in *Stanford Encyclopaedia of Philosophy* <https://plato.stanford.edu/entries/integrity>.

<sup>176</sup> See eg *X and Y*, which concerned a sexual assault on a young woman, in which the Court held, in para 22, that "'private life"... covers the physical and moral integrity of the person, including his or her sexual life'.

<sup>177</sup> On the protection of mental health in abortion law and the scope of relevant considerations, see WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems* (WHO, 2<sup>nd</sup> edn, 2012) para 4.2.1.2.

<sup>178</sup> See eg WHO, *Mental Health Aspects of Women's Reproductive Health: A Global Review of the Literature* (WHO, 2009) esp ch 2.

connected in the abortion context. The Court's neglect of this aspect of psychological integrity is itself consistent with its failure to develop, let alone protect, autonomy in this context, despite its bland references to it.<sup>179</sup> Recognition of both interests is required since sole reliance on psychological integrity may result in continued emphasis only on the *passive* dimensions of health, that is, on mental and physical health as *affected by* a condition, such as pregnancy. So, only a *need* to terminate would at least potentially be recognised, with ongoing neglect of the significance of the interest in being able *actively* to make choices about a matter affecting one's mental (and physical) health and future life course. Currently, the Court's protections of the interest in termination, to the extent that these exist, are dominated by paternalistic concerns which do not accord autonomy, including moral autonomy, to the pregnant woman.<sup>180</sup> While, as Zampas and Gher have argued, the Court's recognition of the health interests at stake in the abortion context is to be welcomed, as Erdman maintains, the 'harm reduction' approach – in which health is helpfully appreciated as an 'objective good' – needs to be complemented with legal recognition of the autonomy interests at stake.<sup>181</sup>

Finally, I consider the implications of the above analysis for the Court's treatment of new and emerging reproductive technologies.

## THE PROSPECTS FOR REPRODUCTIVE HEALTH

An attractive feature of the WHO's account of reproductive issues is its understanding of these in relation to the concept of reproductive health. The account is appealing, and powerful, for what may seem, at face value, its moral neutrality.<sup>182</sup> Yet the concepts of need and autonomy implicit in its account are important moral ones. As we have seen, these concepts can also be situated in relation to an interest-based account of human rights and are thus highly relevant to the development of the ECtHR's reproduction jurisprudence.<sup>183</sup>

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<sup>179</sup> Eg *A, B & C*, para 216.

<sup>180</sup> On the value of this see eg D. Feldman, 'Privacy-related Rights and their Social Value', in P. Birks (ed), *Privacy and Loyalty* (OUP, 1997) 15-50, 42; Erdman, n 76 above, 443, who refers to women being 'entrusted to make decisions' and 461, where she notes that, under international human rights law, '[c]riminal abortion laws are interpreted to violate women's rights where they deny normative plurality on the meaning and significance of abortion'.

<sup>181</sup> Zampas and Gher, n 55 above, 269ff, 272; Erdman, n 76 above, 462; Cook and others, n 139 above, 155, on the 'three approaches, from criminalization, through the promotion of health and welfare, to an emphasis on human rights and justice, [that] exist in many countries, and are not necessarily mutually exclusive'.

<sup>182</sup> On some of the benefits of value neutrality in the abortion debate see Erdman, n 76 above, 425-426.

<sup>183</sup> On the compatibility of an interest-based understanding of rights with the ECtHR's case law, see Letsas, n 19 above, 718 who also discusses the Court's jurisprudence in relation to reason-blocking theories, esp 717-720, 729-732.

Since these are moral concepts, the seriousness of the need is morally contested in both the abortion and medically assisted reproduction contexts, as is the appropriate scope of autonomy. However, the analysis so far has shown that the existing legal consensus among Contracting States in each context can be seen to have settled the relevant *legal* (and moral) entitlements to a certain degree under the ECHR, contrary to the Grand Chamber majority judgments in *A, B & C* and *S.H.* Thus, the analysis has rejected the *A, B & C* majority's position that the consensus under Article 8 that abortion should be available on health and wellbeing grounds is of no legal consequence because of a supposed lack of consensus under Article 2, arguing that a *legal balance* has been struck between the two articles regarding the regulation of abortion, a position apparently consonant with that of the joint (part) dissent. In relation to reproductive donation the analysis has rejected the *S.H.* majority's view that there was not a sufficiently established consensus regarding the permissibility of the use of donated gametes in the IVF context, again a position supported by the joint dissent in that case. The result in both cases is that, on the Court's own terms, the margin of appreciation is narrowed, as the joint (part) dissent in *A, B & C* and the joint dissent in *S.H.* strongly argued. Plainly, *A, B & C* (as regards the first two applicants) and *S.H.* were wrongly decided. Furthermore, the analysis has demonstrated that, since both needs and autonomy interests are at stake in the two contexts, the legal consensus that does exist in each case can also be seen as *recognising a certain degree of need and protecting a certain degree of autonomy*, with the latter sometimes at best implicit in relation to maternal mental health and wellbeing grounds in the abortion context. The Court's failure to decide accordingly was strongly criticised by the joint (part) dissent in *A, B & C* and the joint dissent in *S.H.* In this light, how will women's and men's reproductive interests fare in relation to new and emerging reproductive technologies?

Closest to entering clinical practice in any Contracting State, notably the United Kingdom – which has built here on its strong legal framework for medically assisted reproduction – are mitochondrial replacement techniques (MRTs) to avoid maternally inherited mitochondrial disease.<sup>184</sup> The United Kingdom has already permitted the use of PGD to avoid serious genetic

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<sup>184</sup> The framework was originally established in the HFE Act 1990. The HFE Act 1990 (as amended) allowed for the possibility of subsequent regulations in relation to MRT, in s3ZA(5). The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015 were passed early in 2015 and entered into force on 29 October 2015. See further R. Scott and S. Wilkinson, 'Germline Genetic Modification and Identity: the Mitochondrial and Nuclear Genomes' (forthcoming 2017) OJLS. A form of MRT has been used in Ukraine, not to avoid mitochondrial disease but apparently, and controversially, to assist a couple whose embryos were prone to embryo arrest: P. Dockrill, 'World-First in Ukraine as "Three-Parent" Baby Born to an Infertile Couple: Three Parents, One Baby, and a Lot of Controversy', *Science Alert*, 19 January 2017, <https://www.sciencealert.com/world-first-in-ukraine-as-three-parent-baby-born-to-an-infertile-couple>. In *Costa* the Court has already recognised, under Article 8, 'the desire to conceive a child unaffected by the genetic disease of which... [the parents] are healthy carriers and to use ART and PGD': para 57.

conditions for many years (in addition to PND and selective termination).<sup>185</sup> MRTs are different: they involve changing the genetic composition of an ovum or embryo, substituting ‘healthy’ for ‘unhealthy’ mitochondria (with the aid of a donated ovum).<sup>186</sup> When the UK Government commissioned the Human Fertilisation and Embryology Authority (HFEA) to establish the public’s views regarding the introduction of such techniques, the public was more in favour than against.<sup>187</sup> Despite this, there was opposition to their legalisation.<sup>188</sup> A prominent objection was that women (and couples) have ‘alternatives’: they could adopt, or seek ‘standard’ IVF treatment with a donated ovum.<sup>189</sup> We might call this the ‘Existence of Alternatives’ argument.

This argument acts as a counterweight to the idea of need and challenges the appropriate scope of the relevant autonomy. When invoked, it results in a concomitant *downgrading* of the interest which generates the need – in the case of MRTs, the interest in having not only a child free from serious genetic disease but also to whom the woman, the future mother, is genetically related (through the nuclear genome), where this connection is sought. We can see this argument already being used by the Court in the cases discussed here: from both *A, B & C* and *S.H.* the ideas, respectively, that women needing abortions for health and wellbeing reasons, or couples needing donated gametes with IVF, have the ‘alternative’ of going abroad. In each case, this legal use of the argument turned in part on a failure to recognise a relevant consensus; it was also parasitic on the far more permissive position in the majority of Contracting States. The unacceptability of the ‘going abroad’ alternative has been criticised here and by others.<sup>190</sup> We can also see very clearly in these cases that, given that unacceptability, the autonomy of the applicants (including to seek to

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<sup>185</sup> HFE Act 1990 (as amended), Sched 2, para 1ZA; Abortion Act 1967 (as amended by the HFE Act 1990) s 1(1)(d).

<sup>186</sup> On the techniques see UK Department of Health (DH), *Mitochondrial Donation: A Consultation on Draft Regulations to Permit the Use of New Treatment Techniques to Prevent the Transmission of a Serious Mitochondrial Disease from Mother to Child* (February, 2014) 5.

<sup>187</sup> HFEA, *Mitochondria Replacement Consultation: Advice to Government* (March, 2013) and associated documents available at <http://hfearchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/9359.html>.

<sup>188</sup> Office for Public Management, *Medical Frontier: Debating Mitochondria Replacement, Annex I: Summary of Evidence, Report to HFEA* (February 2013), available at [http://www.opm.co.uk/wp-content/uploads/2014/02/Mito-Annex\\_I\\_-\\_summary\\_of\\_evidence.pdf](http://www.opm.co.uk/wp-content/uploads/2014/02/Mito-Annex_I_-_summary_of_evidence.pdf). The discussion of the evidence is very complex. With regard to the ‘public representative survey’, note eg: ‘[P]articipants were asked for their initial reactions to different aspects of potential treatments for mitochondrial disease. The first question was: “Scientists are developing techniques which could remove the chance of these mitochondrial diseases by altering the genetic make-up of an egg or embryo during IVF. What is your initial reaction to this?” Over half (56%) were “very” or “fairly” positive about this and 10% were “very” or “fairly” negative about this. One third (33%) of respondents were undecided (“neither positive nor negative” or “unsure”).’ Emphases in original.

<sup>189</sup> Eg at ‘Mitochondrial Donation: Is It Safe? Is It Ethical?’, Progress Educational Trust Debate, 2 February 2015, per Philippa Taylor, Head of Public Policy at the Christian Medical Fellowship, and Consultant on Family and Bioethics at Christian Action Research and Education. See further discussion of ‘the existence of sufficiently good alternatives’ in Wilkinson and Williams, n 159 above, 562-564.

<sup>190</sup> Above n 76 and n 133.

address their needs in their own countries) was severely constrained.<sup>191</sup> In challenging the idea of need and the appropriate scope of autonomy, the Existence of Alternatives argument contests the *strength* of the relevant reproductive interests.

In turn, this raises important questions regarding who can and should judge this issue, encompassing as it does a judgment as to whether there is a need for a given reproductive technology, coupled with the acceptability, or otherwise, of the ‘alternatives’ between which a woman or couple can ‘choose’. As we have seen, according to the ECtHR, *prima facie* the more important the interest is, the greater the degree of protection it should receive and the narrower the margin of appreciation should be; crucially, however, lack of consensus can negate this.<sup>192</sup> In effect, and significantly, where the strength of the interest is contested the consensus doctrine can prevent the Court from direct consideration of the critical question of that strength. Since, for instance, infertility issues or the risk of serious genetic disease in offspring affect a minority,<sup>193</sup> and given the likely influence of hostile preferences in relation to the lawfulness of reproductive interventions and technologies, this is highly problematic.

As regards upcoming reproductive technologies that are not yet legal, policy debates have now begun regarding, for instance, the moral and legal permissibility of nuclear genome editing technologies such as CRISPR/Cas-9 to avoid serious genetic conditions in offspring.<sup>194</sup> In-vitro derived gametes to relieve infertility and maintain genetic connection between parents and children (where this be sought) are also the subject of research, including potentially in relation to same-sex couples, and may soon enter the policy arena.<sup>195</sup> In these and other cases questions will arise about the degree of need and the appropriate scope of autonomy as regards the technologies.<sup>196</sup> Ultimately, it is likely that the ECtHR will have to address these questions, at which point many of the insufficiently addressed issues at stake in *S.H.* in particular will resurface. If the Court’s answer to potential future challenges as to the legal impermissibility of the use of these technologies in various Contracting States will be to rely heavily on the idea of a lack of consensus,

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<sup>191</sup> On the importance of significant options to autonomy, recall Joseph Raz’s work, eg in his ‘Right-based Moralities’, (1982) in J. Waldron (ed), *Theories of Rights* (OUP, 1984) 182-200, esp 186-195.

<sup>192</sup> As occurred in *A, B & C* and *S.H.*, in which the analysis of consensus itself was also flawed in both cases, as shown above.

<sup>193</sup> HFEA, n 40 above; and *ibid*, 15, regarding figures eg for PGD.

<sup>194</sup> See eg NCOB, *Genome Editing: An Ethical Review* (2016) esp s 4 regarding reproductive uses in humans; and the NCOB’s Working Party on ‘genome editing and human reproduction’: <http://nuffieldbioethics.org/project/genome-editing/working-party>.

<sup>195</sup> See eg NCOB, ‘Forward Look 2016, 25 February’, on ‘Artificial Gametes’ available at <http://nuffieldbioethics.org/wp-content/uploads/NCOB-Forward-Look-2016-Artificial-gametes.pdf>. See further eg S. Segers and others, ‘Balancing Ethical Pros and Cons of Stem Cell Derived Gametes’ (2017) *Ann Biomed Eng*, doi: 10.1007/s10439-017-1793-9.

<sup>196</sup> NCOB (2016) n 194 above, s 4.54, noting conceptual questions such as the distinction between ‘need’ and ‘preference’, ‘treatment’ and ‘enhancement’.



it is likely to be a long time before it seriously considers the strength of the reproductive interests at stake in their use.<sup>197</sup> Where it finds a lack of consensus, this may only tell us that many States have not considered the issue in question; alternatively, if a prohibitive consensus is found, it may only tell us that, mindful of their margins under the sometimes lax eye of the ECtHR, States have allowed concerns as to ‘morals’ to support prohibition.<sup>198</sup> It is also conceivable that, over time, a prohibitive consensus will be the result of considered reflection in which various States decide, for instance, that nuclear genome editing is too problematic to permit although, perhaps not surprisingly, a recent UK survey of people affected by relevant genetic conditions showed ‘overwhelming’ support for their development for therapeutic purposes.<sup>199</sup>

## CONCLUSIONS

When resort to the margin and consensus doctrines – exacerbated by accompanying analytical flaws – hampers the reasoning of the Court, as occurred in *A, B & C* and *S.H.*, it fails seriously and directly to address the strength of the reproductive interests at stake. In this way, the Court answers the questions posed above – regarding who can and should judge the seriousness of such interests – by saying, in effect, that where this seriousness is contested, those with moral objections to certain reproductive interventions or technologies can preclude appropriately rigorous analysis of States’ obligations under Article 8 by the Court. Since such objections may well include relatively weak concerns held by those who have no need for a given intervention or technology and thus no interest in choosing it, this is a significant flaw in the Court’s framing of the margin and consensus doctrines. Should this continue, it will likely result in the entrenchment of insufficiently considered restrictive approaches to reproductive issues that fail properly to address the strength of the interests at stake and, as appropriate, to respect and protect reproductive rights, with considerable detriment to women’s, and sometime men’s, reproductive health.

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<sup>197</sup> Mahoney, n 38 above, although in favour of the margin within limits, notes, 82: ‘[T]he potential for temptation, in effect for evading having to decide, is there in every hard case.’

<sup>198</sup> See Letsas, n 29 above, 124, on the unacceptability of piecemeal evolution.

<sup>199</sup> Genetic Alliance UK, *Genome Editing Technologies: The Patient Perspective* (Genetic Alliance UK, 2016) 16.